Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-502

CLIFFORD S. STRIKE and
MARJORIE STANLEY STRIKE,

Appellants,

v.

TRANS-WEST DISCOUNT CORPORATION,
T.D. SERVICE COMPANY,

Appellees.

On Appeal From The Fourth District Court Of
Appeal Of The State Of California

MOTION TO DISMISS

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TRANS-WEST DISCOUNT CORPORATION,
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Appellees.

On Appeal From The Fourth District Court Of
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MOTION TO DISMISS

The Appellees move the Court to dismiss this appeal pursuant to Rule 16 on the grounds that (a) the appeal is not within the jurisdiction of this Court because not taken in conformity to statute and the rules of this Court, and (b) the federal question sought to be reviewed was neither properly raised nor expressly passed on below.

I

INTRODUCTION

Appellants ("STRIKE") sued for injunctive and declaratory relief to prevent appellee ("TRANS-WEST") from foreclosing a deed of trust pursuant to California Civil Code Section 2924. While STRIKE's complaint asserted the invalidity of a security agreement between the parties on the grounds that "said agreement was executed under duress, is violative of public policy, is usurious, is illegal, and was not supported by adequate consideration" (First Amended Complaint, 6:24-26), the complaint did not draw into question the validity of any state statute.

The trial court ultimately dissolved STRIKE's preliminary injunction and entered a declaratory judgment in favor of TRANS-WEST, confirming TRANS-WEST's right to non-judicially foreclose its trust deed.

STRIKE appealed to California's Fourth District Court of Appeal, contending that under California law, the deed of trust was in fact an "equitable lien" which could not be nonjudicially foreclosed, that the trial court misapplied the usury law, and that the trial court erroneously awarded attorneys' fees. On appeal, as in the trial court, STRIKE did not question the validity of any statute.

The decision of the Fourth District Court of Appeal (filed May 3, 1979) is attached as Appendix "A" to STRIKE's Jurisdictional Statement. Notwithstanding STRIKE's representations to this Court, that decision does not uphold the validity of California's Confession of Judgment Statute against

a claim of repugnancy to the United States Constitution. The decision makes no mention of that statute (California Code of Civil Procedure §§ 1132-34). Not only was the validity of that statute not raised at trial, it was never raised until after the District Court of Appeal had rendered its decision! The decision shows on its face that the constitutionality of the California Confession of Judgment statute was never an issue. Regarding the Confession of Judgment, the decision of the Court of Appeal states: "Its validity and enforceability is not in question." See *Strike v. Trans-West,* 92 Cal.App.3d 735, 739 (1979); STRIKE's Jurisdictional Statement at A-3.

After the decision had been rendered, STRIKE petitioned the Court of Appeal for a rehearing contending that the Judgment was erroneous "because it fails to recognize the potential invalidity" of a Confession of Judgment pursuant to California Code of Civil Procedure § 1133. The point had never been previously raised and under California procedure it was not properly before the court. The Court of Appeal properly denied a rehearing, after which the California Supreme Court properly denied a hearing.

II

ARGUMENT

A. The Appeal Is Not Within The Jurisdiction Of This Court, Because Not Taken In Conformity To Statute And The Rules Of This Court.

STRIKE purports to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(2). It will be demonstrated (*infra*, part B) that that statute does not apply since no Federal question was presented below.

Where a state supreme court denies a hearing, the judgment of the intermediate court rather than the order of refusal by the higher court is the judgment reviewable under Section 1257. *Sullivan v. Texas*, 207 U.S. 416 (1908); *American Ry. Exp. Co. v. Levee*, 263 U.S. 19, 20-21 (1923); *Hammerstein v. Superior Ct.*, 341 U.S. 491, 492 (1951); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 (1954); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678, n. 1 (1968).

The decision of the Fourth District Court of Appeal (Appendix "A" to STRIKE's Jurisdictional Statement) was filed on May 3, 1979. Under Rule 11(3), in order to timely appeal to this Court, STRIKE was required to file his notice of appeal within the time allowed by law and to docket the case within the time provided in Rule 13.

Under Rule 2(a) of the California Rules of Court, the notice of appeal had to be filed within 60 days after notice of entry of judgment (by July 2, 1979). STRIKE's notice of appeal was not filed until September 18, 1979. (See Appendix "C" to STRIKE's Jurisdictional Statement.) Rule 13 of the United States

Supreme Court requires that the case be docketed not more than 90 days after entry of the judgment appealed from. The judgment appealed from was entered on May 3, 1979, and the appeal had to be docketed under Rule 13 not later than August 1, 1979. It was not docketed until September 25, 1979.

B. The "Federal Question" Sought To Be Reviewed Was Neither Properly Raised Nor Passed On Below.

STRIKE apparently contends that the decision below upholds the validity of the California Confession of Judgment statute (Cal. Code Civ. Proc. §§ 1132-34), and that the validity of that statute was drawn into question below on the ground of its being repugnant to the Fifth and Fourteenth Amendments to the United States Constitution. 28 U.S.C. § 1257(2) confers limited jurisdiction upon this Court: the judgment appealed from must reflect a substantial federal question that has been properly raised and necessarily decided in the state court proceedings.

It is essential to the jurisdiction of the Supreme Court under § 1257 that a substantial federal question has been properly raised in the state court proceedings. The proper method of raising the federal question is dependent upon the particular state practice. See *Central Union Co. v. Edwardsville*, 269 U.S. 190, 194-195 (1925); *Pennsylvania R. Co. v. Illinois Brick Co.*, 297 U.S. 447, 462-463 (1936); *Parker v. Illinois*, 333 U.S. 571, 574-575 (1948).

In California, matters never called to the attention of the trial court are beyond the record and must be disregarded on appeal.

Knapp v. Newport Beach, 186 Cal.App.2d 669, 679 (1960). Here there is no mention of the California Confession of Judgment statute in the record. Its alleged invalidity was never raised before the decision *on appeal* had been filed. The issue was not before the trial court and it was not before the Court of Appeal.

The Supreme Court is vested with no jurisdiction unless a federal question was raised and decided in the state court below. *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969). Where the highest state court fails or refuses to pass expressly upon the federal question, the burden is upon the appellant to show that he properly raised to question (*i.e.,* that the state court's failure to deal with it was not for want of proper presentation). When the highest state court has failed to pass upon a federal question, "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York,* 394 U.S. 576 (1969). STRIKE does not meet his burden in this regard and his Jurisdictional Statement is therefore deficient under Rule 15(1)(d).

The failure to raise the federal question at trial precludes Supreme Court review. See *Hulbert v. Chicago,* 202 U.S. 275, 279-281 (1906); *Edelman v. California,* 344 U.S. 357 (1953); *Mutual Life Ins. Co. v. McGrew,* 188 U.S. 291, 309 (1903). Where, as here, the constitutional issue is not raised at trial, as required by state law, but is raised for the first time in a petition for rehearing addressed to the state intermediate court, which does not address or decide the issue, the highest state court's action in refusing without opinion to hear the case precludes review by the Supreme Court. *Stembridge v. Georgia,* 343 U.S. 541, 547 (1952). Briefs before the state courts are not ordinarily

part of any record filed with the Supreme Court and cannot be used to establish that a federal question was raised. *Live Oak Ass'n. v. Railroad Commission,* 269 U.S. 354, 357-358 (1926); *Lynch v. New York ex rel. Pierson,* 293 U.S. 52, 54 (1934).

Moreover, in the instant case the alleged federal question was not properly presented below even when (as an after thought) STRIKE belatedly purported to raise it. In the petition for rehearing in the intermediate court, (where STRIKE first attacked this Confession of Judgment statute) STRIKE merely pointed out that the California Supreme Court in a different case had held the statute "unconstitutional as a violation of due process." The same statement was made in STRIKE's petition for hearing in the California Supreme Court. Neither petition framed any federal question within the meaning of Section 1275. As stated in *Oxley Stave Co. v. Butler County,* 166 U.S. 648, 655 (1897); "the jurisdiction of this court to reexamine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right." Here there was neither reference to the particular clause of the Federal Constitution relied upon nor the rights claimed thereunder. This Court has held insufficient mere reference to the "Constitution of the United States" (*Herndon v. Georgia,* 295 U.S. 441, 442-443 (1935)) or the "Constitution and laws of the United States," (*Oxley Stave Co. v. Butler County,* 166 U.S. 648, 656 (1897)), or "due process of law" (*Bowe v. Scott,* 233 U.S. 658, 664-665 (1914)).

As stated in *New York Central R. Co. v. New York,* 186 U.S. 269, 273 (1902), "it is well settled in this court that it must be

made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and such provision must be set forth." Hence if the claim is made that a state statute is "unconstitutional" or that it denies "constitutional rights," it will be assumed that reference is being made to the State Constitution and rights thereunder rather than to the Federal Constitution. See *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67-68 (1928). Where, as here, the state constitution has a due process clause, a claim that "due process" has been violated will be deemed to relate to that clause (*Bowe v. Scott, supra*, 233 U.S. 658, 664-665 (1914)) and there will be no federal question to be reviewed. Where, as in the instant case, no Federal question was properly presented below, the Supreme Court should summarily dismiss the appeal. See *Ford Motor Co. v. Pace*, 364 U.S. 444 (1960); *Anderson v. Thorington Construction Co.*, 363 U.S. 719 (1960).

III

CONCLUSION

The instant appeal is from a state intermediate appellate court decision, which shows on its face that the appeal is not within the jurisdiction of this Court. The decision does not meet the requirements of 28 U.S.C. § 1257(2), and the appeal has not been perfected in accordance with the rules of this Court. Moreover, the decision below decided no federal question; none was properly presented. The appeal should be summarily dismissed.

Respectfully submitted,

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DATED: October, 1979